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BEFORE THE SURFACE TRANSPORTATION BOARD

Yakima Interurban Lines Association, )  
-- Abandonment Exemption -- in ) AB 600 (sub-no 1-X)  
-- Yakima County, WA )

ENTERED  
Office of Proceedings

MAR - 5 2007

Part of  
Public Record

**Declaration of Bob Kershaw in Opposition to Motion to Extend**

1. I am a shareholder in Kershaw Sunnyside Ranches, Inc. (Kershaw Sunnyside Ranches). I am also chairman of the board of directors of Kershaw Sunnyside Ranches. I make this declaration based on knowledge of facts to which I am competent to testify and would testify at trial. It is one of many companies in which I am a shareholder and am actively involved in management. The other companies include Kershaw Fruit and Cold Storage, Inc., (Kershaw Fruit) Domex, Inc. and others. I will refer to them all as the "Kershaw Companies".

2. The rail line at issue in the proceeding dissects Kershaw Sunnyside Ranches' and Kershaw Fruit's property. (A copy of a map showing the location of the line is attached as **exhibit 1**). Kershaw Sunnyside Ranches is a vertically integrated fruit company. 3. The Kershaw Companies had approximately \$300,000,000 in sales for the 2006 calendar year. We operate an office, fruit packing facility, and orchards from 151 Low Road, Gleeed, Washington. The offices in exhibit 1 are the offices out of which the Kershaw Companies operate. They are located just to the east, or right in the picture, from the parking lot.

4. The Kershaw Companies have plans for immediate expansion in the area of the rail line, to the east of our existing facility. The map in exhibit 1 shows expansion for a distribution center and loading area to service it. If we expand, we will locate a distribution center on the east side of the rail line. The expansion will require us to cross the rail line with forklifts hauling bins of fruit, such as apples, on a regular basis.

5. We have tried to work with Yakima County to resolve issues of the location of the existing rail line, but have reached an impasse recently because Yakima County's lawyer wants us to dismiss our claims for damages in an unrelated lawsuit in Yakima County

Superior Court for Damages against Yakima Interurban Lines Association (YILA) before it will agree to move the location of the rail line at issue in this proceeding. (A copy of my lawyer's letter to Yakima County's lawyer is attached as **exhibit 2**. A copy of Yakima County's lawyer's letter to my lawyer, is attached as **exhibit 3**). It appears to me that YILA is trying to use this rail banking petition to indefinitely delay in an attempt to try to gain an advantage in the Yakima County proceeding.

6. We employ approximately 250 people working at our Low Road facility. Our expansion will add 6 shipping bays and a new distribution center to our facility at Low Road. We would expect that it would add a substantial number of working wage jobs to our payroll and add needed commercial construction to the Yakima Valley. The Yakima Valley needs the type of working wage jobs we will offer. The Kershaw companies would like to have a trial also; however, a trail in the location of the current rail line would be dangerous because of the chemicals we spray in or around the area and because of trucking traffic.

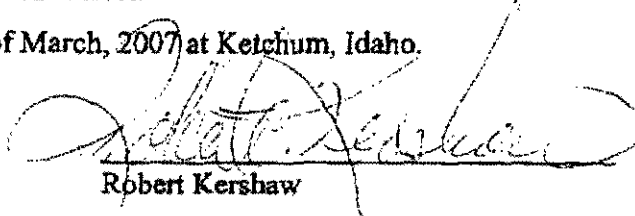
7. The deed under which YILA owns the property was a private deed given by my grandfather to one of YILA's predecessors. It requires the railroad at its own cost and expense to provide "four suitable and convenient crossings." (A copy of the deed is attached as **exhibit 4**). YILA is bankrupt and is not providing the crossings. The STB decision on November 19, 2004, indicated that the STB recognized that we had legitimate concerns related to YILA's management of the property. It stated that we had to incur expense to spray herbicides in the right-of-way to control the growth of weeds and unwanted vegetation. If the STB grants another continuance for YILA to negotiate, we will again be forced to pay the expenses to maintain the right-of-way that YILA has not maintained since before 2000. We will also not have adequate crossings in order to allow us to traverse the property with our forklifts and other equipment that we will use to transport from our packing facilities on the west side of the line to our distribution center on the east side of the line. This will cause an additional financial burden to us.

8. Because this rail banking proceeding has been continuing for such a long time it has continued to delay our ability to expand. As a result, we are not able to continue to grow and increase our revenue and profitability.

9. I do not want the STB to extend the time for YILA and the other governmental entities to continue to try to rail bank. I understand that YILA does not have a current plan to pay any of the approximately \$750,000 in judgment liens that have existed on the track since at least 2001. YILA continues to be insolvent and continues to claim that it will rail bank, but this delay is costing my companies and me. It is also costing the people of Yakima County.

I hereby certify under the penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Signed this 1 day of March, 2007 at Ketchum, Idaho.



Robert Kershaw

CERTIFICATE OF SERVICE

By my signature below, I certify service on March 2, 2007, by U.S. Mail, postage pre-paid first class, a copy of the foregoing upon the following counsel of record:

Charles Montange  
Attorney at Law  
426 NW 162nd Street  
Seattle, WA 98177

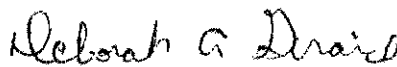
Erik G. Light  
Office of the General Counsel  
Surface Transportation Board  
395 E Street, SW, Suite 1260  
Washington, DC 20423-0001

Paul Edmondson, Esq. (YILA)  
313 North Third Street  
Yakima, WA 98901

Raymond L. Paoletta  
City Attorney  
City of Yakima  
200 South Third St.  
Yakima, WA 98901-2830

Lawrence E. Martin, Esq.  
Halverson & Applegate, P.S.  
1433 Lakeside Court, Suite 100  
Yakima, WA 98907-2715

Terry Austin, Esq.  
Chief Civil Deputy Pros. Atty.  
Yakima County Courthouse  
128 North 2nd Street, Room 211  
Yakima, WA 98901

  
\_\_\_\_\_  
Deborah A. Girard

## **EXHIBIT 1**



## **EXHIBIT 2**

**Velikanje Moore & Shore, P.S.**

attorneys at law

**VMS**

Morris G. Shore  
George F. Velikanje  
Alan D. Campbell  
James C. Carmody  
Carter L. Field  
J. Jay Carroll

Mark E. Fickes  
Brendan V. Monahan  
Kevan T. Montoya  
Travis W. Misteidt  
Garon K. Jones  
James S. Elliott

Sarah L. Wixson  
Katie B. Wyckoff  
Chad L. Hatfield  
John S. Moore\*  
\*Of Counsel

February 1, 2007

Charles H. Montange  
426 NW 162nd St.  
Seattle, WA 98177

Re: *Kershaw Sunnyside Ranches v. YILA*

Dear Charles:

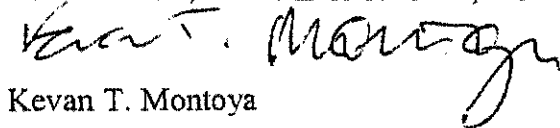
As we discussed during our telephone conversation on January 29, 2007, Kershaw Sunnyside Ranches will not waive or release its right to damages against Yakima Interurban Lines Association (YILA) related to claims in the *Kershaw Sunnyside Ranches v. Yakima Interurban Lines Association, Level 3* litigation. I do not understand your instance on linking waiver of claims in that litigation in which you are not counsel of record with the issue of the railbanking.

Your request that Kershaw Sunnyside Ranches hold the County or others harmless in the event of installation of a rail line is unreasonable. I have specifically stated to other county representatives that Kershaw Sunnyside Ranches would not agree to this. The county people with whom I spoke did not seem to have an objection to this position earlier.

You claim that you are working for Yakima County, The City of Yakima, City of Naches and YILA. Your insistence of a waiver of claims against YILA to the detriment of the creation of a trail appears to put you in a conflict of interest situation in which advancing YILA's position causes a potential detriment to the County and cities. It is regrettable that at this point the citizens of Yakima County will not get the benefit of a trail or a voluntary contribution by Kershaw Sunnyside Ranches to make it happen.

Very truly yours,

VELIKANJE, MOORE & SHORE, P.S.

  
Kevan T. Montoya

KTM:dg

cc: Bob Kershaw (via email)  
Don Skone, Greenway  
Al Brown, Greenway



## **EXHIBIT 3**

CHARLES H. MONTANGE

ATTORNEY AT LAW

426 NW 162ND STREET

SEATTLE, WASHINGTON 98177

(206) 546-1936

FAX: (206) 546-3739

5 February 2007

Kevan T. Montoya  
Velikanje, Moore & Shore  
Box 22550  
Yakima, WA 98907

Re: Your letter of 1 Feb.  
KSF v. STB, etc.

Dear Mr. Montoya:

This is a response to your letter to me dated February 1. That letter seems to be based on some misperceptions, and in the hope of clarifying your thinking and hopefully moving all this forward, I will try to be very clear on some issues you raise.

1. Response to your first paragraph. When I agreed on behalf of my clients to a stay pending mediation in your Ninth Circuit case, that was conditioned on Kershaw Sunnyside Farms (KSF) not taking actions that drive up the litigation costs of my clients anywhere. Since that time, KSF filed a motion at STB against YILA and the County (to which I had to respond, and as a result of which I almost terminated the stay), and now I learn that KSF is pursuing a trial in state court against YILA. It makes little sense for either County or YILA to relieve pressure on KSF in the Ninth Circuit while KSF seeks advantages elsewhere. Also, from what I have been told and from what I have read, the state proceeding damage claim against YILA is tiny, KSF has been offered the full amount claimed (even though the claim is misplaced), and KSF has refused the settlement without reason. Moreover, it appears that KSF may be trying to get a judgment or determination in state court that the line is abandoned. In either event, why should my clients stay a case in the Ninth Circuit in which abandonment was not authorized and which you will likely lose, while you actively pursue a case that appears predicated on an abandonment that has never occurred which you insist upon pursuing despite being offered a reasonable settlement? To me, a truce is a truce, not a license to see what you can get from one forum on an issue you lost in another.

2. Response to your second paragraph. The County people told me they expected to be held harmless by someone for increased costs to accommodate KSF. If not KSF, then who is going to do this? KSF is the party advantaged, and when we went into mediation, I understood KSF agreed to bear the costs of

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relocation; the only question was identification (if possible) of a reasonable alternative location.

3. Response to your third paragraph. This paragraph charges me with conflict of interest. It is predicated on your assumptions that (a) the people of Yakima County will somehow lose the trail because I called off the Ninth Circuit "mediation" (which amounted only to a stay in briefing while KSF was supposed to present an alternative route to the County), or (b) the County would lose a "contribution" from KSF. But you have stated no credible grounds in any judicial or administrative proceeding or elsewhere that would deny the people of Yakima County the benefit of a trail, nor have you revealed to me (either directly or indirectly through the County) any "voluntary contribution" that KSF is prepared to make to assist in making a trail. To the contrary, the County tells me in effect that KSF so far simply wants (or at least prefers) the railroad (and any trail) off as much KSF property as possible at someone else's expense. But to relocate off KSF property will impose increased financial burdens for rail and trail construction (and overhead), risks relating to section 106 and risks relating to wetlands. Indeed, it is not clear that the re-route is economically and environmentally feasible, and it would likely require an STB proceeding in the circumstances to sanction it, in order to avoid risk of loss of the whole corridor. What KSF proposes thus does not amount to a voluntary contribution by KSF of anything of value; instead, it sounds like KSF is offering to create a lot of costs and possibly fatal risks for the County. It leaves the County and YILA worse off. This is not a contribution by KSF to the trail; it is a demand for contributions to KSF.

I have been told that maybe the local greenway supporters would pay money to defray the costs of buying land for KSF's proposed relocation of the rail corridor. But this still does not assure that risks to the trail due to relocation are removed or even minimized. The relocation may run into environmental or regulatory roadblocks. In any event, a voluntary contribution by the "greenway" as discussed above to facilitate relocation to convenience KSF would be a contribution to KSF, not the trail. While I have not discussed the matter to my knowledge with any "greenway" representative, that would appear to be a diversion of resources that could otherwise help the County establish a rail with trail or trail. In short, KSF has not identified any positive contribution which it has made or would make "for the trail," much less for continued rail operations (which KSF seems to "write off" entirely). KSF has only proposed benefits for itself at the expense of others, including the trail.

Since nothing I have done risks either the trail or anything qualifying as a KSF contribution, there obviously is no conflict of interest. In any event, it is not a conflict of

interest on my part to take into account KSF's misguided efforts either to break up the corridor in state court or to obtain judgments in state court which might be secured against corridor assets, and which the County then must resolve when and if it becomes successor to YILA. It would be dereliction of duty, not conflict of interest, to allow KSF to so compartmentalize its targets in the circumstances.

By the way, the fact that you must brief the Ninth Circuit case does not mean that negotiations are at an end. It just means that you have to brief the Ninth Circuit case. We believe KSF's position in that litigation to be frivolous, and actually suggest that you voluntarily dismiss the petition for review. That would seem to accomplish your end of avoiding litigation expense. As to location of facilities, if KSF has any proposals that actually would move the County and YILA into a better position than they are now, I am certain that my clients would be very interested in hearing about them. The real problem is that all KSF proposals to date, as well as KSF actions before STB or in court to date, have suggested that KSF either has no intent to move the County or YILA into a better position, or does not care what happens to the County or YILA in respect to the corridor so long as the corridor is somewhere else. That certainly is the kind of adversarial view which lawyers often take.<sup>1</sup> But it is not something consistent with mediation or settlement. Mediation and settlement suggest compromise, and compromise in litigation is based on reasonable evaluations of the strength and weakness of each side's legal position.

Finally, this letter is provided either as part, or the conclusion, of settlement discussions, depending on whether you wish to continue. Nothing herein should be deemed to admit the merits of any claim made by KSF, or the concession of any fact to the detriment of YILA, Yakima (City or County), or Naches. This letter is not for use in any litigation.

Very truly,



Charles H. Montange

cc. Terry Austin, Esq. (County) (w/encl.)  
Ray Paoella, Esq. (City) (w/encl.)  
Paul Edmondson, Esq. (YILA) (w/encl.)

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<sup>1</sup> Of course, as the letter indicates, I do not see any lawful basis to oppose the corridor in its present location, for either rail or trail purposes.

## **EXHIBIT 4**

WITNESS their hands this 25th day of September, 1905.

By Edward Whitson her Attorney in fact.

~~SECRET~~

E. A. Kershaw and Ora A. Kershaw, husband and wife, the parties of the first part, and the NORTH YAKIMA & VALLEY RAILWAY COMPANY, a corporation duly organized and existing under the laws of the State of Washington, and having its principal place of business in the City of North Yakima, County of Yakima, State of Washington, the party of the second part.

WITNESSETH: That whereas the said parties of the first part are the owners of certain real property situate in said County of Yakima, State aforesaid; and the said party of the second part is about to construct a railway over a portion of said premises, the property of said parties of the first part;

AND WHEREAS, said parties of the first part wish to grant said railway company, its successors or assigns, a right of way over a portion of said premises for said railway and also the right to and of constructing said railway and operating the same through and over said premises forever.

NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS, That we, the said E. A. Kershaw and Ora A. Kershaw husband and wife, the parties of the first part, for and in consideration of the sum of one thousand & 00 Dollars, lawful money of the United States, to him in hand paid by the said party of the second part and other good and valuable considerations including the covenants of second party, hereinafter contained receipt whereof is hereby acknowledged, do hereby give, grant, sell, confirm and convey to the said party of the second part, the NORTH YAKIMA & VALLEY RAILWAY COMPANY, a Corporation, its successors or assigns, a strip of land seventy five feet wide, in, along, over and through the hereinafter described land in Yakima County, Washington, the property of said party of the first part, to be used by said party of the second part as a right of way for a railway forever, together with the perpetual right to construct, maintain and operate a railway or railways over and across the same. Said strip of land being a certain strip of land seventy five feet wide across the E. 2 of S.W. 4 and the S.W. 4 of S.E. 4 of Sec. 24 twp. 14 N. R. 17 E. W. M. also the N.W. 4 of the N.E. 4 of Sec. 25 twp. 14 N. R. 17 E. W.M. being a strip of land seventy five (75) feet in width 37 1/2 feet on each side of the center line of the railroad of said company as the same now is located and staked out across said premises, together with any and all additional widths that may be necessary to catch the slopes of the cuts and fills of the roadbed of said railroad; also across the southwest quarter of the northwest quarter of said section twenty four (24), subject, however, to a right-of-way eighty feet in width heretofore granted by first parties hereto to the North Coast Railway, a corporation, under contract bearing date October 2, 1905, and filed for record in the office of the Auditor of Yakima County, Washington, on October 3, 1905, at 8:25 o'clock A. M. said right-of-way to be hereafter surveyed and located over and across said tract as provided in said contract, and subject to all the rights of said North Coast Railway, a Corporation, under said contract; provided, second party hereto shall not be entitled to the possession of any portion of said above described right-of-way over any portion of said last described tract, until said right-of-way to the North Coast Railway shall have been surveyed and determined as provided in the contract therefore above referred to and then only to the portion of its above described right of way falling outside of the limits of the right of way of said North Coast Railway as the same shall hereafter be determined and fixed.

TO HAVE AND TO HOLD the said right of way, strip of land, easements, privileges and appurtenances to it, the said North Yakima & Valley Railway Company, its

successors or assigns, forever, provided, it is understood and agreed that second party its successors or assigns, shall at its or their own proper cost and expense, provide and maintain over and across said railroad and right of way four suitable and convenient crossings of sufficient width to permit the use thereof of wagons, hay rakes and other ordinary farm machinery, in passing to and from the portions of said premises separated by said railroad and right-of-way with proper approaches and one of which shall be an open crossing, provided with proper cattle guards, and the others may be provided with convenient and suitable gates, which shall be provided and maintained by second party, its successors or assigns. The points at which said crossings shall be provided and maintained to be designated by first parties at time of construction of said railroad; also, it is understood and agreed, that second party, its successors or assigns shall erect and maintain a good and lawful fence on each side of its right of way over and across said described premises; also that second party shall, at its own cost and expense provide suitable means and ways for conducting over and across its said right of way and under its said railroad, any and all water necessary for the proper irrigation of said premises, and of all irrigation ditches now crossing said right of way, at the same relative location as at present and as the same can be used as at present; provided, second party shall also construct and maintain a spur from its main line of railroad, to be located at a point to be designated at time of constructing, said railroad for the use of first parties, their heirs or assigns, in loading produce upon cars upon said premises, the necessary land for said spur to be donated and graded by first parties.

It is understood and agreed that the aforesaid covenants and agreements on the part of second party shall run with said granted right of way and be binding upon said company, and its successors and assigns, so long as a railway may be maintained by it or them, over and across said premises.

Executed the Fourth day of October, 1905.

Witness:

Geo. S. Vance.

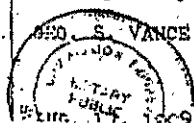
Edward A. Kershaw

Ora A. Kershaw

STATE OF WASHINGTON, )  
                                  ) SS.  
County of Yakima. )

On this Fourth day of October, 1905, before me, the undersigned, a notary public in and for said County of Yakima, duly commissioned and sworn, personally appeared Edward A. Kershaw and Ora A. Kershaw, husband and wife, known to me to be the same persons described in and who executed the within instrument and have acknowledged to me that they executed the same, freely and voluntarily and for the uses and purposes therein mentioned; and as their free and voluntary act and deed for said purposes.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Geo. S. Vance,

Notary Public for the State of  
Washington, residing at North Yakima,  
Washington.